Cheall v. *APEX*[3] referred to the reasoning of the speeches in *New Zealand Shipping Company, Ltd.* v. *Societe Des Ateliers Et Chantiers De France*[4]. The underlying principle there is that unless a contract clearly and specifically so provides, the court will not construe an avoiding provision contained in it in such a manner so as to permit a party to take advantage of a situation brought about by his own act or omission.

Lord Atkinson said in the *New Zealand Shipping case* at page 9:-

"But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract."

Lord Finlay L.C. in the same case at page 6, puts it more briefly thus: "It is a principle of law that no one can in such case take advantage of a state of things which he himself produced".

There are other facts of this case we note which also seem to indicate an improper exercise of the power in paragraph 6 of the tenancy agreement. As early as July 17, 1982 in the letter from the respondent replying to the query by the appellant the first reason was disclosed in the first sentence of the letter produced earlier in the judgment that the bowling alley was to be closed because of financial losses. Then almost simultaneously with the writing of that letter the respondent advertised in the *Malay Mail* to let out the said premises. We also note that by letter dated August 21, 1982 (pg. 127) the respondent informed the appellant that the bowling centre would be closed on October 4, 1982 which means that on the date that the notice to quit expired (on August 1, 1982) the bowling alley was still not closed.

We accordingly allow the appeal. We grant a declaration to the appellant that the tenancy agreement has not been validly terminated.

As no evidence was adduced on the application for an injunction we make no order on any injunction.

The claim for damages for breach of contract shall be referred back to the judge for assessment.

Counter-claim by the respondent is dismissed.

Costs to the appellant here and in the court below. Deposit to be refunded to appellant.

Appeal allowed;
Counterclaim by respondent dismissed.

Solicitors: *Skrine & Co.; Shook Lin & Bok.*

KHENG CHWEE LIAN v. WONG TAK THONG

[F.C. (Wan Suleiman, Seah & Hashim Yeop A. Sani F. JJ.) June 8 & July 28, 1983]

[Kota Bahru – Federal Court Civil Appeal No. 179 of 1981]

Contract – Sale of land – Fraudulent misrepresentation – Land transferred to third parties – Compensation – Contract Act, 1950 ss. 13, 15, 16, 17 & 18 – Specific Relief Act, 1950, ss. 13 & 18(3).

Land Law – Sale of half share in land – "Jual putus" – Subsequent agreement for partition – Fraudulent misrepresentation – Compensation.

Practice and procedure – Claim to share in land – Portions of land transferred to third parties – Order for subdivision of land affecting third parties – No jurisdiction to make order – Compensation – Specific Relief Act, 1950 ss. 13 & 18(3) – R.H.C. 1980, O. 45, r. 8.

In this case the respondents had bought a half share in a piece of land from the appellant and had paid the purchase price. Subsequently the respondent was induced to sign another agreement under which he was allocated a small portion of the land. The respondent alleged that he was induced by the false representation of the respondent to sign the second agreement. He applied to the court for a declaration and obtained a declaration that he was the owner of one half of the land and an order that the land be subdivided. Portions of the land had however been transferred to the sons of the appellants. The sons were not parties to the action.

Held: (1) the transaction under the first agreement was a *jual putus* and the consideration had been settled. There was no appeal against the finding of the trial judge on this point;

(2) the learned trial judge was correct in holding that the respondent had been induced by misrepresentation into signing the second agreement and the misrepresentation was fraudulent. The agreement was voidable at the option

of the respondent and had been lawfully repudiated by him;

(3) the court had no jurisdiction over any person other than those brought before it, as parties or as persons treated as if they were parties. The order for subdivision must be set aside and instead compensation should be ordered to be paid in respect of the deficiency of shares in the land to be transferred to the respondents.

Cases referred to:

(1) *Pertab Chunder Ghose* v. *Mohendra Purkait* (1888-89) 16 I.A. 233.
(2) *Ganapathy Chettiar* v. *Periakaruppan Chettiar & Anor.* [1962] M.L.J. 207.
(3) *Brydges* v. *Brydges & Wood* [1909] P.187.
(4) *Re Shephard* (1890) 43 Ch. D. 131.
(5) *Coleman* v. *Coleman* [1920] P.71.
(6) *Bhup Narain Singh* v. *Gokhul Chan Mahton* (1933-34) 61 I.A. 115.
(7) *Ong Chat Pang & Anor.* v. *Valliappa Chettiar* [1971] 1 M.L.J. 224.
(8) *Loh Koon Moy & Anor.* v. *Zaibun Sa binti Syed Ahmad* [1978] 2 M.L.J. 29.

FEDERAL COURT.

H.S. Lim for the appellants.
Toh Puan Mehta for the respondents.

Cur. Adv. Vult.

Seah F.J. (delivering the judgment of the Court): This is an appeal from a decision of the High Court at Kuala Trengganu declaring that the plaintiff/respondent is the owner of one-half of the land now known as Lot 2080, Mukim Chabang Tiga, Kuala Trengganu held under K.R.M. 991 and ordering that the said land be so subdivided that the respondent should retain the area he now occupies plus an additional area so as to make up his total holding to be one-half of the entire area of the said land and that the remaining area should go to the defendant/appellant and her five sons whose shares in the said land should therefore be adjusted accordingly.

At all material times the appellant was the registered owner of a parcel of land described as A.M.T. 1, Mukim of Kuala Trengganu. It is common ground that the said land is now known as Lot 2080, Mukim Chabang Tiga, Kuala Trengganu held under K.R.M. 991 and contains an area of 1.533 acres, more or less.

On May 12, 1954 the appellant and the respondent executed a document called "Surat Perjanjian". The signature of the appellant was witnessed by her son, Soon Hup Cheng and that of the respondent by Poh Yin Chun. Following the signing of this agreement the respondent went into occupation of the front portion of the said land facing the main road and erected a biscuit factory thereon with the knowledge and consent of the appellant. The respondent has had been in occupation of this portion of the said land ever since.

It was the case of the respondent that by the agreement of May 12, 1954 (hereinafter referred to as "the first agreement") the appellant had agreed to sell to the respondent one-half share in the said land for the sum of $1,775.00 (Dollars one thousand seven hundred and seventy five only) and this amount was duly received by the appellant. The appellant's case was that the transaction was in fact a friendly loan made up of $1,500.00 as principal, $270.00 as agreed interest and $50.00 as petition-writer's fee and that the respondent misrepresented and induced her into signing the agreement on the representation that the security for the loan should be in the form of a sale agreement. The learned judge accepted the version related by the respondent and rightly pointed out that under the term of the first agreement the transaction was a *jual putus* and that the purchase price of $1,775.00 was *jelas* or settled. There was no appeal by the appellant against the conclusion reached by the learned judge.

Next, on October 23, 1957 the appellant and the respondent purported to execute another document (hereinafter referred to as "the second agreement") in Bahasa Malaysia and the relevant parts of the English translation certified by a Court Interpreter read as follows:–

"The First Party is the owner of a piece of land known as A.M.T. 1, Mukim of Kuala Trengganu at around Balek Bukit. On May 12, 1954 the First Party entered into an agreement with the Second Party selling half (½) share of the said land to the Second Party.

Whereas the Second Party is in need of the land and it was found to be too narrow to be subdivided lengthwise and therefore it is not possible for both parties to use the land to build houses. While both parties were discussing the Second Party chose the front portion near the road as the Second Party urgently needed the said portion.

The Second Party agree to accept the said half share of the land facing the main road with an area of thirty-three by ninety feet (90 x 33) enough to accommodate the building only and the Second Party agree to give back to the First Party the back portion measuring 90 x 33 feet without any reimbursement.

The First Party acknowledged the renunciation of the front portion of the land measuring 90 x 33 feet to the

Second Party and the acceptance of the back portion of the land measuring 90 x 33 feet."

The appellant's case was that this second agreement cancelled and replaced the first agreement and that the respondent was only entitled to an area measuring 90 x 33 feet and not to one-half share of the said land. The case of the respondent was that he was induced by fraudulent misrepresentation into signing the second agreement. Alternatively, it was contended that the second agreement was never intended as a cancellation and/or replacement of the first agreement.

Having considered the conflicting testimonies given by the appellant and her witnesses and that of the respondent the learned judge said:–

"In the circumstances I accept that the plaintiff (respondent) was tricked or misled into signing the second agreement by Soon Hup Cheng (DW3), the defendant (appellant)'s son. The plaintiff was not aware that he was giving up his bigger share in the land in return for a ridiculously small area, which is not even enough to accommodate his existing factory. It is noted that the original size of the factory was 94 x 38 feet, and with the extension (vide amended plan dated September 7, 1957) its size became enlarged to 102 x 38 feet. Yet the area purported to have been accepted by the plaintiff was only 90 x 33 feet which means that part of factory is occupying areas not owned by him. I can't accept this as a deal which a reasonable man like the plaintiff, a fairly successful businessman, would accept. Why should he when there was absolutely no rhyme or reason for him to do so?"

The learned judge rejected the testimony of the petition-writer, Wan Mohd. bin Endut (DW1) that he explained the contents of the second agreement to both the appellant and the respondent and that both signed in his presence, when the petition-writer could not give a satisfactory explanation how he could remember so vividly this particular incident which happened about 25 years ago.

Now, two or more persons are said to consent when they agree upon the same thing in the same sense (section 13 of the Contract Act 1950) and consent is said to be free when it is not caused by:–

(a) coercion, as defined in section 15;

(b) undue influence, as defined in section 16;

(c) fraud, as defined in section 17;

(d) misrepresentation, as defined in section 18; and

(e) mistake, subject to sections 21, 22 and 23.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake (section 14). "Fraud" includes any of the following acts committed by a party to a contract, or with his connivance or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:–

(i) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;

(ii) the active concealment of a fact by one having knowledge of belief of the fact;

(iii) a promise made without any intention of performing it;

(iv) any other act fitted to deceive; and

(v) any such act or omission as the law specially declares to be fraudulent (section 17).

"Misrepresentation" includes:–

(i) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(ii) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and

(iii) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement (section 18).

In the case of *Pertab Chunder Ghose* v. *Mohendra Purkait*[1] Sir Richard Couch in giving the judgment of the Privy Council said at page 237:–

"Where one party induces the other to contract on the faith of representations made to him, anyone of which is untrue, the whole contract is, in a Court of Equity, considered as having been obtained fraudulently ..."

Under paragraph 3 of the second agreement there was clear misrepresentation of fact that the existing biscuit factory was only occupying an area containing 90 x 33 feet when in actual fact, the area occupied by the respondent at the relevant time was 94 x 38 feet. And on September 7, 1957 the respondent had submitted an amended building plan to the Town Council applying for

permission to extend the length of his factory by another 8 feet to provide for living quarters for his family. In other words, by September 1957 the respondent knew for a fact that the overall length of his biscuit factory would be 102 feet. Applying the principle enunciated in *Pertab Chunder Ghose* case to the facts of this case, we agree with the finding of the learned judge that the respondent was induced by misrepresentation into signing the second agreement and in our view, the misrepresentation was fraudulent within the meaning of section 17(a) and (d) of the Contract Act 1950 (Revised 1974). It follows as a corollary that the respondent did not consent to the execution of the second agreement within the meaning of section 13 thereof. By virtue of the provision of section 19 of the Act the second agreement was voidable at the option of the respondent, and the learned judge was right in holding that, on the pleading, it had been lawfully repudiated by the respondent. We are reminded of the principle that the greatest respect should be paid to the findings of fact of a judge of first instance, based on seeing and hearing the witnesses and forming an estimate of their credibility. Since learned counsel for the appellant has been unable to show that the learned judge in the court below had erred in any way, we do not wish to disturb his findings on this point.

Having disposed of the second agreement we come now to deal with the main substance of this appeal. It was not in dispute that after the execution of the first agreement and following the issue of the land title to Lot 2080, Mukim Chabang Tiga, Kuala Trengganu held under K.R.M. 991 the appellant had on various dates subsequent thereto transferred to her five sons undivided shares amounting to about two-thirds of the total area of the said land, full particulars of which are as follows:–

(a) On May 14, 1967 to Soon Hup Soon – 924/6677648

(b) On May 14, 1967 to Soon Hup Liam – 924/6677648 – $1,000.00

(c) On April 21, 1968 to Soon Hup Liong – 1848/6677648 – $2,000.00

(d) On March 15, 1973 to Soon Hup Cheng – 2224651/6677648

(e) On March 15, 1973 to Soon Hup Seng – 2224651/6677648 – $15,000.00

As a result of these transfers the appellant is presently the registered owner of 2224560/6677648 undivided shares in the said land. In short, the appellant now owns approximately one-third undivided share in Lot 2080, Mukim Chabang Tiga, Kuala Trengganu held under K.R.M. 991. On April 25, 1973 the respondent, having discovered these transfers, lodged a caveat against one-half share of the said land, and instructed counsel to take out a writ against the appellant without making any of the five sons of the appellant as co-defendants to the action. At the hearing of this appeal leave was given to all the five sons to intervene pursuant to Rule 64 of the Rules of the Federal Court 1980 and they are represented by learned counsel who also appears for the appellant. It was submitted on behalf of the interveners that the order of the learned judge clearly affected their registered title share and interest in the said land and under section 340(1) of the National Land Code 1965 their title share and interest shall be deemed to be indefeasible. As interested parties it was argued that the interveners had been denied a hearing and an order so made was held to be wholly irregular [*Ganapathy Chettiar* v. *Periakaruppan Chettiar & Anor.*[2]].

In our judgment, the court below has no jurisdiction inherent or otherwise, over any person other than those properly brought before it, as parties or as persons treated as if they were parties under statutory provisions [*Brydges* v. *Brydges & Wood*[3]; *Re Shephard*[4] and *Coleman* v. *Coleman*[5]]. The terms "judgment" and "order" in the widest sense may be said to include any decision given by a court on a question or questions at issue between the parties to a proceeding properly before the court [see para 501 of *Halsbury's* Laws of England (4th ed.) Vol. 26 at page 237]. And at para 550 the following passages appear:–

> "Subject to appeal and to being amended or set aside, a judgment is conclusive as between the parties and their privies and is conclusive evidence against all the world of its existence, date and legal consequences."

We are constrained to agree with the submission of learned counsel for the interveners that the order of the learned judge was wholly irregular insofar as it purports to affect the registered title, share and interest of the said interveners in the said land when they had not been made parties or given a full opportunity of taking part in the proceedings in the court below. If the respondent had wanted the whole one-half share in the said land in pursuance of the first agreement after knowledge of the registration of these transfers by the appellant to her five sons, he ought to have joined the sons and particularly Soon Hup

Cheng as co-defendants in the proceeding. Since all these transfers were made by the appellant subsequent to the signing of the first agreement, the onus of proof would be on them to show that they were *bona fide* purchasers for value without notice of the first agreement on the authorities of *Bhup Narian Singh* v. *Gokhul Chan Mahton*[6] and *Ong Chat Peng & Ors.* v. *Valliappa Chettiar*[7]. The respondent, however, did not adopt this course of action. For the reasons given above we set aside that part of the order of the learned judge directing that the respondent should be entitled to one-half of the entire area of the said land now known as Lot 2080, Mukim Chabang Tiga, Kuala Trengganu held under K.R.M. 991. Since the appellant was no longer the registered owner of one-half share of the said land it was not possible for the court to order specific performance in accordance with the term of the first agreement. In our opinion, learned counsel for the respondent ought to have drawn the attention of the learned judge to the provisions of sections 13 and 18(3) of the Specific Relief Act 1950 (Revised 1974). Section 13 reads:–

"Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency."

And section 18(3) is as follows:–

"If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly."

In our judgment, either section 13 or section 18(3) may properly be invoked to the facts of this case. For this reason we allow the appeal of the interveners and substitute the undermentioned order in place of that made by the learned judge in the court below, viz:–

A declaration that the plaintiff/respondent was the beneficial owner of one-half share or 3338824/6677648 undivided shares in the said land now known as Lot 2080, Mukim Chabang Tiga, Kuala Trengganu held under K.R.M. 991 containing an area of 1.533 acres, more or less and ordering the defendant/appellant to transfer to the plaintiff/respondent all the 2224650/6677648 undivided shares now registered in her name within thirty days from date hereof and further ordering the defendant/appellant to pay compensation to the plaintiff/respondent is respect of the deficiency, viz. 1114174/6677648 undivided shares. It is further ordered that if the amount of compensation payable cannot be agreed upon between the parties it is directed it be assessed by a Senior Assistant Registrar. And if the defendant/appellant defaults in executing a registrable memorandum of transfer within the specified time it is ordered that the Senior Assistant Registrar attached to the High Court in Malaya at Kota Bahru, Kelantan, be empowered to sign the transfer on her behalf (*Loh Koon Moy & Anor.* v. *Zaibun Sa binti Syed Ahmad*[8] and Order 45 rule 8 of the Rules of the High Court 1980).

As regards costs it is ordered that the appellant shall pay to the respondent one-half of the taxed costs here and in the court below. The Court deposit to be paid to the respondent on account of taxed costs. We make no order with regard to the costs of the interveners in this appeal.

Order accordingly.

Solicitors: *H.S. Lim, Teo & Partners; Mehta & Co.*

ONG AH LONG v. DR. S. UNDERWOOD

[F.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah F.JJ.) April 25 & July 29, 1983]

[Kuala Lumpur – Federal Court Civil Appeal No. 118 of 1982]

Tort – Negligent driving – Contributory negligence – Damages – Special damages to be pleaded – Damages for pain and suffering agreed – Damages for loss of future earnings – Loss of earning capacity – Assessment of damages – Principles applicable.

This was an appeal from the decision of the High Court at Ipoh which gave judgement for the respondent and awarded the sum of $2,017,440 in general and special damages due to the injuries suffered by him and caused by the negligent driving by the appellant of a motor van which grazed against the respondent's left arm while he was walking beside his car in a street in Ipoh.

Held: (1) the learned trial judge was correct in holding that there was no question of contributory negligence on the part of the respondent, that the appellant was wholly to blame for failing to pay attention to the presence of other road users and in consequence thereof failed to allow sufficient space between his van to enable the respondent